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DECISION

THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-193445 DATE: August 1, 1979

MATTER OF: Department of the Air Force

DIGEST:

1. Common carrier is not liable for costs of X-raying shipment of rocket motors at destination to determine whether they were damaged while in possession of common carrier for transportation.

2. Settlements of Comptroller General are not decisions and are not considered precedents for future disbursements of public money.

3. Under GAO regulations requests for reconsideration of Claims Division settlements must be submitted by head of agency concerned.

This decision involves the liability of a common carrier for the costs of X-raying a shipment of rocket motors at destination to determine whether they were damaged while in the possession of the common carrier for transportation. It responds to two letters dated October 4, 1978, file ACFTF/7654, from the Headquarters Air Force Accounting and Finance Center (Finance Center) requesting reconsideration of two Certificates of Settlement dated September 8, 1978, in which our Claims Division allowed two claims of Pacific Intermountain Express (PIE) involving those X-ray costs, each for $3,821.34.

We affirm the two Claims Division settlements and decide that the common carrier is not liable for the X-ray costs. We also advise the Secretary of the Air Force that under our regulations requests for reconsideration of Claims Division settlements must be submitted by the head of the agency concerned.

In December 1974, Government drivers operating Government tractors transported jet thrust units (rocket motors) on Government-owned, multi-stage trailers equipped with air bag suspension systems from McClellan Air Force Base, California, to Sacramento, California, where the motors were delivered on the trailers to the facilities of PIE, a motor common carrier, for delivery to Hill Air Force Base, Utah. Four motors, weighing 108,000 pounds, were delivered to the carrier on Government bill of lading (GBL) No. K-5155422 on December 12, 1974, and four, weighing 110,000 pounds, were delivered on GBL No. K-5155459 on December 13, 1974.

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The rocket motors, each valued at over $211,000, are delicate units containing propellants. Each unit becomes a component of a missile, which when assembled is valued at millions of dollars. If the propellant encasement is in a cracked condition when fired, the entire missile is destroyed. Because of their susceptibility to damage during movement, special trailers with air bag suspension systems are furnished by the Government to transport the units on the highway. The air bags when properly inflated are intended to cushion the units from road shocks.

The Air Force has informed carriers of the delicate nature of the rocket motors, and instructs carriers' personnel how to properly inflate the special trailer suspension system.

When these units arrived at destination the air bags on the trailers were flat. To assemble the units with the missiles under these circumstances would jeopardize the missiles upon firing. The only method of inspecting the units for damage is by X-ray; the units handled by PIE were X-rayed by the Government at a cost of $3,821.34 for each shipment. No damage to the units was discovered.

For each shipment the Finance Center set off $3,821.34 from freight charges otherwise due the carrier to recover expenses incurred in X-raying the motors, which the Finance Center alleges was required by the failure of PIE to maintain air in the trailers' suspension bags during transportation. PIE's claims for $3,821.34 on each shipment were allowed in the Certificates of Settlement of September 8, 1978.

PIE contends in effect that even if the cargo was in good condition with air bags inflated when the trailers were delivered to the carrier at origin, there is no carrier liability for the expenses of inspection when the shipments were delivered at destination with the air bags flat. We must agree with PIE.

The rule of a common carrier's strict liability, that is, liability for loss or damage without a showing of negligence, has no applicability to the facts of this case. The absence of injury or harm to the units is fatal to any claim for compensatory damages. Even proof of the carrier's negligence in failing to maintain the air bags in an inflated condition during transportation and proof that the carrier knew of the delicate nature of the cargo would not aid the Government in an action seeking compensatory damages.

Litigation seeking damages against PIE would require the Government to establish a prima facie case of carrier liability. The Supreme Court in Missouri Pacific R.R. v. Elmore & Stahl, 377 U.S. 134 (1964) articulated the elements necessary for a prima facie case. Among other elements, it is essential to show delivery of the property at destination by the carrier in a damaged condition. The results of the X-ray inspection, instead of establishing the carrier's liability, absolve the carrier. The inspection found no damage.

A basic principle underlying common law remedies is that they afford only compensation for the injury suffered. Illinois Central R.R. v. Crail, 281 U.S. 57 (1930). Under section 20(11) of the Interstate Commerce Act, 49 U.S.C. 20(11), made applicable to motor carriers by section 217 of the Act, 49 U.S.C. 317, a common carrier is liable "for the full actual loss, damage or injury * * *." Missouri Pacific R.R. v. Elmore & Stahl, supra. Actual damage is synonymous with compensation for purposes of the common law remedy. 25 C.J.S. 2d Damages § 2.

The legal concept of actual loss or damage under section 20(11) (in terms of injury and harm) was clarified in Missouri Pacific R.R. v. H. Rouw Co., 258 F.2d 445 (5th Cir. 1958). The court there emphasized that the "market value rule" dove-tails with the rule permitting recovery of compensatory damages only. 258 F.2d at 447. The "market value rule" refers to the measure of damages. The measure of damages, within the meaning of section 20(11) of the act, is the difference between the value of the property in the condition in which the property should have arrived and its market value in the condition it did arrive. Gulf, Colorado & Santa Fe Ry. v. Texas Packing Co., 244 U.S. 31, 37 (1917). There is no way to determine the measure of damages here because the Finance Center has shown no injury or harm to the rocket motors.

The fact that PIE had knowledge of the delicate nature of the cargo and the need for keeping the air bags inflated relates to the question of whether the carrier had a legal duty to maintain the suspension system and whether the duty was breached, thereby incurring a legal wrong. We have reservations over any contention that such a legal duty, the breach of which would constitute a legal wrong, could exist in the absence of a special covenant in the contract of carriage showing that the carrier, in exchange for additional consideration, specially promised to keep the air bags

inflated. Compare Johnson v. Bekins Moving & Storage Co., 389 P.2d 109 (Idaho, 1964), cert. den. 379 U.S. 913. But even if a legal wrong could be established, the Government would be in no better legal position under the facts of this case because to recover damages (money), it must be shown that damage (injury or harm) resulted from the wrong (breach of the duty). 22 Am. Jur. 2d. Damages § 2.

Expenses of inspection to determine whether property was damaged while in possession of a common carrier is beyond the grasp of common carrier liability. To hold a carrier liable for such unforeseeable expenses it would be necessary to draft a covenant showing that liability for costs of inspection were clearly contemplated by the parties as the measure of damages resulting from a breach of a covenant to keep a trailer's air bags inflated. Krauss v. Greenbarg, 137 F.2d 569, 570 (3rd Cir. 1943), cert. den. 320 U.S. 791, reh. den. 320 U.S. 815 (1943).

In the October 4 letters the Finance Center refers to each settlement as a "decision" which it believes would have an adverse impact on the Government claim collection activities in a number of similar shipments.

Settlements of the Comptroller General of the United States are not decisions and are not considered precedents for future disbursements of public money, 43 Comp. Gen. 788 (1964); they may not be lawfully revised by any officer of the agency concerned. 14 Comp. Gen. 572 (1935); see, also, 39 Comp. Gen. 886 (1960). Absent a timely-filed request for reconsideration, payment should be made in accordance with the Certificate of Settlement.

Although the request for reconsideration was timely, it was not in accord with our regulations which at 4 C.F.R. 32.1 (1978) provide:

> "Settlements made pursuant to 31 U.S.C. 71 will be reviewed (a) in the discretion of the Comptroller General upon the written application of (1) a claimant whose claim has been settled or (2) the head of the department or Government established to which the claim or account relates, or (b) upon motion of the Comptroller General at any time." (Emphasis Added)

Furthermore, our regulations require that applications for review state the errors which the applicant believes have been made and which form the basis for the request. 4 C.F.R. 32.2 (1978). But the October 4 letters merely expand on the material presented to our Claims Division in the Finance Center's administrative reports dated June 4, 1977. However, since the Finance Center states that these settlements would affect many other similar cases, we reviewed them on our own motion. 4 C.F.R. 32.1(b) (1978).

Deputy Comptroller General
of the United States